IN THE

Supreme Court of the United States

October Term, 1978

No. 78-610.

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

v.

GARY L. PENICK, et al.,
Respondents.

No. 78-627.

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

v.

MARK BRINKMAN, et al.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE ON BEHALF OF THE DELAWARE STATE BOARD OF EDUCATION, ALEXIS I. DuPONT SCHOOL DISTRICT, CLAYMONT SCHOOL DISTRICT, CONRAD SCHOOL DISTRICT, MARSHALLTON-McKEAN SCHOOL DISTRICT, NEWARK SCHOOL DISTRICT, NEW CASTLE-GUNNING BEDFORD SCHOOL DISTRICT AND STANTON SCHOOL DISTRICT, AMICI CURIAE, AND BRIEF AMICI CURIAE.

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Pursuant to Rule 42(3) of this Court, the Delaware State Board of Education and former independent school districts of the State of Delaware, Alexis I. DuPont School District, Claymont School District, Conrad School District, Marshallton-McKean School District, Newark School District, New Castle-Gunning Bedford School District, and Stanton School District, move this Court for leave to file the attached brief as amici curiae in support of the position of the petitioners in the above matters.

In support of this motion, the applicants represent as follows:

1. The Delaware State Board of Education is the petitioner in *Delaware State Board of Education v. Evans,* No. 78-671, filed on October 20, 1978.

2. The Alexis I. DuPont School District, Claymont School District, Conrad School District, Marshallton-McKean School District, Newark School District, New Castle-Gunning Bedford School District and Stanton School District are the petitioners in *Alexis I. DuPont School District, et al. v. Evans,* No. 78-672, filed on October 20, 1978.

3. The petitions in the above entitled cases present substantial questions concerning the propriety of federal court desegregation remedies in light of this Court's decisions in *Dayton Board of Education v. Brinkman,* 433 U. S. 406 (1977); *Brennan v. Armstrong,* 433 U. S. 672 (1977); and *School District of Omaha v. United States,* 433 U. S. 667 (1977). The petitions in the *Columbus* and *Dayton* cases present questions concerning the proper scope of federal court desegregation orders and the disposition of these cases by the Court will likely have a substantial impact upon the disposition of these applicants' petitions.

4. The instant cases present this Court with an opportunity to further articulate and clarify the legal and equitable principles which must govern lower courts not only in these instant cases, but in other cases pending in this Court as well as the numerous cases presently pending in the lower federal courts throughout the country.

5. Applicants believe that their brief expression of views contained in the appended brief, based on their experiences in a case which is both markedly similar and dissimilar from the cases before the Court, can aid the Court in formulating a broadly applicable rule of decision.

6. These applicants have requested the consent of the parties to these cases to the filing of a brief as amici curiae, but consent has not been granted by the respondents. The consents on behalf of the petitioners in both cases are being filed with the Clerk. Wherefore, these applicants respectfully move this Court for leave to file the accompanying brief amici curiae.

Respectfully submitted,

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OPINIONS BELOW

The July 14, 1978 opinion of the Sixth Circuit Court of Appeals in *Penick v. Columbus Board of Education* is

reported at 583 F. 2d 787 (6th Cir. 1978). The March 8, 1977 liability opinion and order of the District Court are reported at 429 F. Supp. 229 (S. D. Ohio 1977). The July 29, 1977 order and the October 14, 1977 memorandum and order of the District Court directing the systemwide desegregation plan in the Columbus School District are not reported and are reproduced in the Appendix to the Petitioners' petition for certiorari in the *Columbus* case.

The July 27, 1978 opinion of the Sixth Circuit Court of Appeals in *Brinkman v. Gilligan* is reported at 583 F. 2d 283 (6th Cir. 1978). The unreported opinion of the District Court was entered on December 15, 1977 and is reproduced in the Appendix to the petition for certiorari filed in *Dayton Board of Education v. Brinkman.*

JURISDICTION

This Court's jurisdiction has been invoked pursuant to 28 U. S. C. § 1254(1). Certiorari was granted in both cases on January 8, 1979. 45 U. S. L. W. 3451.

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the Constitution of the United States provides, in part:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

INTEREST OF THE AMICI CURIAE

The Delaware State Board of Education is the petitioner in *Delaware State Board of Education v. Evans,* No. 78-671, filed with this Court on October 20, 1978. Alexis I. DuPont School District, Claymont School District, Conrad School District, Marshallton-McKean School District, Newark School District, New Castle-Gunning Bedford School District, and Stanton School District are the petitioners in *Alexis I. DuPont School District, et al. v. Evans,* No. 78-672, also filed with this Court on October 20, 1978. Both petitions seek to invoke this Court's review of a desegregation order which, inter alia, has conglomerated eleven formerly independent political entities of the State of Delaware (including the petitioner districts); within the conglomeration area has imposed an areawide racial balance plan involving more than 60% of the students in the State of Delaware; has dictated a substantial increase in local property tax rates upon the residents of the former petitioner districts; and has disenfranchised the citizens of the affected area from elections of their school board until 1984, all of this allegedly by way of remedy for undetermined constitutional violations. The District Court opinion is reported as *Evans v. Buchanan,* 447 F. Supp. 982 (D. Del. 1978), and was affirmed by the Third Circuit Court of Appeals on July 24, 1978, as *Evans v. Buchanan,* 582 F. 2d 750 (3rd Cir. 1978). Both opinions may be found in the Appendix to the Petition for Certiorari in No. 78-671. This Court has not yet acted upon the petitions for certiorari filed by these amici.

The *Columbus* and *Dayton* cases present this Court with questions the resolution of which may be determinative of the rights of the parties in Nos. 78-671 and 78-672. The Sixth Circuit Court of Appeals in *Columbus* approved, and in *Dayton* imposed, comprehensive racial balance plans for metropolitan, urban areas. In both cases, the Sixth Circuit sought to justify these excessive remedies by the finding that dual school systems existed as of the time of this Court's decision in *Brown I, Brown v. Board of Education,* 347 U. S. 483 (1954), combined with the find-

ing of discrete constitutional violations subsequent to that time.

In *Evans v. Buchanan*, the federal courts have imposed a comprehensive racial balance plan on an entire metropolitan urban area which formerly consisted of eleven autonomous school districts, each a separate governmental entity under Delaware law, without any finding of interdistrict violations by any of the school districts. The alleged justification for the extreme remedy was that the eleven school districts (or their predescessors) once maintained dual systems of education prior to *Brown I* in accordance with state law and that, although ten of the districts had operated unitary systems since shortly after *Brown I*, vestiges of de jure segregation had not been eliminated in five buildings in the eleventh district, and that discrete constitutional violations, including acts of non-school officials, had occurred subsequent to *Brown I*, although the courts below have never made findings that any of these violations involved segregatory intent or motive.

In all three cases, i.e., *Dayton*, *Columbus*, and *Wilmington*, the Courts of Appeals concluded that it was the unmeasured, cumulative effect of the foregoing condition which was to be remedied, thus purporting to justify an areawide racial balance in each case.

SUMMARY OF ARGUMENT

In imposing areawide racial balance plans in Columbus, Dayton and Wilmington, the federal courts have gone demonstrably beyond the proper scope of any equitable remedy in a school desegregation case. In each case, the area of school desegregation is an urban, metropolitan area with residential concentrations of blacks. In each case, the courts have recognized that this phenomenon of racial concentration was not caused by school officials but was, in fact, beyond their control. It has been recognized that without any of the alleged violations in the cases, substantial racial concentration would nevertheless exist. The application of comprehensive racial balance desegregation orders in this context represents an aberration of the equitable principles to which this Court has hewed in school desegregation cases. This Court should take this opportunity to require the lower courts to adhere to the purpose of school desegregation remedies as previously announced by this Court. That is, like any equitable remedy, school desegregation remedies are to restore the victims of discrimination to a position approximating as closely as possible that which would have existed in the absence of any constitutional violation. The remedies here have been punitive rather than restorative.

ARGUMENT

School desegregation remains an intractable social and legal issue in 1979, twenty-five years after *Brown I*. One major reason is the patent unwillingness of the lower federal courts to accept this Court's rulings that a remedy is warranted only by a constitutional violation and then only to the degree that the remedy is specifically designed to cure the actual effects of the violation. In the absence of definitive action by this Court in these cases, school desegregation promises to remain an unresolved issue for many more years to come.

I. Nationwide or Regional Standards

In the two "northern" cases before the Court, dual systems were found to have been maintained as of 1954. In Wilmington, a "southern" case, there were undeniably dual school systems in existence in 1954 as a result of state law. However, the school systems of the State were effectively desegregated by 1967, *Evans v. Buchanan*, 379 F. Supp. 1218, at 1222-23; *Evans v. Buchanan*, 393 F. Supp. 428 at 451; and the school systems of the metropolitan Wilmington area had been recognized as having been "integrated" by 1960, *Evans v. Ennis*, 281 F. 2d 385, at 393 (3d Cir. 1960). The Wilmington School District alone in the northern tier of districts was found to have committed later constitutional violations. 393 F. Supp. 428, at 435-36.

This Court must eventually decide whether racial imbalance in metropolitan areas is to be treated differently in the north than in the south—that is, whether punitive desegregation decrees are appropriate for one area of the country because original sin can never be redeemed. We urge this Court to adopt a single standard for school desegregation decrees, to be applied to all states, by acknowledging that *de jure* segregation, once eliminated,

cannot be a factor in imposing additional duties upon otherwise innocent school boards.

In *Dayton Board of Education v. Brinkman*, 433 U. S. 406 (1977), this Court stated:

> "The duty of both the District Court and the Court of Appeals, in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is first to determine whether there was any action in the conduct of the business of the school board which was intended to and did in fact, discriminate against minority pupils, teachers and staff." 433 U. S. at 420.

Under this Court's precedents, it is clear that the first inquiry in all jurisdictions is to determine whether school officials have fulfilled their affirmative obligation to eradicate the vestiges of the officially imposed dual system. But, the Third Circuit suggested that the ruling in *Dayton* has no applicability to the former southern and border states which maintained *de jure* segregation as of 1954. *Evans v. Buchanan*, 582 F. 2d 750 at 763, 766 (3rd Cir. 1978). This suggestion would make it unnecessary for the lower courts to make any findings as to the extent, if any, of the continuing effects of pre-*Brown* violations in such cases. To find a pre-*Brown* violation to exist as a historic fact would become a sufficient predicate for a systemwide racial balance remedy. To the contrary is *School District of Kansas City v. State of Missouri*, 460 F. Supp. 421, 441 (W. D. Mo. 1978).

This Court has never ruled that there is a greater duty to eradicate the vestiges of a dual system in a "de jure" State. Nor has it ever implied that a different remedial standard is applicable. In fact, the Court has indicated the contrary. As stated by Mr. Justice White, dissenting in *Milliken v. Bradley*, 418 U. S. 717, at 777 (1974):

"That these broad principles have developed in the context of dual school systems compelled or authorized by state statute at the time of [*Brown I*] does not lessen their current applicability to dual systems found to exist in other contexts, like that in Detroit, where intentional school segregation does not stem from the compulsion of state law, but from deliberate individual actions of local and state school authorities directed at a particular school system. The majority properly does not suggest that the duty to eradicate completely the resulting dual system in the latter context is any less than in the former."

The thrust of the Sixth Circuit's rulings in *Columbus* and *Dayton* is that, given the existence of a dual system in 1954 and the existence of discrete constitutional violations thereafter, the remedial power of the federal courts is virtually unlimited to decree an areawide racial balance remedy. The Third Circuit's view, as expressed in *Evans v. Buchanan, supra,* appears to be that such unlimited power exists where the prior dual system was one mandated by statute and that the extent, if any, of the continuing effects of such a system is not relevant.[1] We urge this

1. In *Evans v. Buchanan,* the Court of Appeals considered the fact that a statutorily mandated dual school system existed in New Castle County, Delaware, in 1954 implemented, as it was, by interdistrict transfers of black and white children from some suburban districts to the city district to be the "base" reason for the inapplicability of Dayton. The Court of Appeals (as did the single Judge District Court that succeeded the three Judge Court) did not consider the lack of causation between those interdistrict transfers and the vestiges found to exist in five Wilmington district schools by the three Judge Court and gave no weight to the three Judge Court's findings that (1) the interdistrict transfers were terminated following *Brown,* 393 F. Supp. at 433; (2) the termination of the transfers did not have a significant effect on the racial balance of the Wilmington schools, 393 F. Supp. at 434, fn. 8; and (3) the ten suburban districts operated unitary systems shortly after *Brown* and thereafter, 393 F. Supp. at 437, fn. 19. The Courts also ignored the observations of a predecessor panel of the Court of Appeals for

Court to declare again that the function of the remedy is only to eradicate the actual effects of prior unlawful segregation, whatever the 1954 status of the State, and that reversal should be forthcoming in both the Sixth and Third Circuit cases.

II. Incremental Segregative Effect

This Court's 1977 decision in *Dayton Board of Education v. Brinkman, supra,* would seem to require inferior courts to review constitutional violations to determine the actual continuing effect of those violations upon the composition and distribution of the public school population and to fashion a remedy designed, as nearly as practicable, to place the school system and its students in a condition that would have existed in the absence of the violations. This would necessarily impose upon the lower courts the duty to make "complex factual determinations". 433 U. S. at 420. That appears to have been the understanding of the District Court in the *Dayton* case. It is also the approach adopted by the trial judge in the *Indianapolis* case, a multi-district case. See *United States v. Board of School Commissioners of the City of Indianapolis,* 456 F. Supp. 183 (S. D. Ind. 1978).

The Sixth Circuit Court of Appeals in the *Columbus* and *Dayton* cases and the Third Circuit Court of Appeals in the *Wilmington* case have adopted a different interpretation of the meaning of this Court's decision in *Dayton.*

1. (Cont'd.)
the Third Circuit to the effect that many of Delaware's schools, "particularly in the Wilmington metropolitan area" had been integrated, *Evans v. Ennis,* 281 F. 2d 385 at 393 (3d Cir. 1960). A conclusion of attenuation between the only pre-*Brown* interdistrict school violations and the continuing vestiges found in five schools located in the city school district should have been inescapable. Rather, the Court permitted a fact of history to control a critical issue of the case, seizing upon this Court's "long since ceased" language.

In *Penick v. Columbus Board of Education*, 583 F. 2d 787 (6th Cir. 1978), Judge Edwards eviscerated the *Dayton* rule of specific findings of violation with a remedy to match by ruling that school policies had systemwide implications and therefore were systemwide violations. He then concluded that "the impact of the total amount of segregation found" was the incremental segregative effect which must be remedied. Since racial imbalance marked the *Columbus* system, a systemwide racial balance plan was deemed in order.

Similarly, in *Brinkman v. Gilligan*, 583 F. 2d 243 (6th Cir. 1978), the Sixth Circuit, overruling findings of fact made by the trial judge, concluded that the violations found had systemwide impact and, relying upon its earlier ruling in Columbus, concluded that the segregation to be remedied was the "total amount of segregation found". 583 F. 2d at 258. In addition, the Court, *ex post facto*, imposed a burden of proof upon the defendants which they apparently had not met (having never been given the opportunity to do so.)

In *Evans v. Buchanan*, 582 F. 2d 750 (3rd Cir. 1978), the Third Circuit initially found this Court's *Dayton* pronouncement to be inapplicable to a "southern" case. 582 F. 2d at 763, 766. Nevertheless, the Third Circuit proceeded to conclude that, even were Dayton applicable to a "southern" case, all that a court need do is consider the cumulative effect of the violations and devise a remedy at least broad enough to overcome those effects, 582 F. 2d at 764, whatever else it also brings within its ken.[2] Accord-

2. The illogic of this approach is vividly presented in the Wilmington case. Even though the Court of Appeals for the Third Circuit held in 1977 that it would be highly speculative to determine which of the eight suggested violations were summarily affirmed by this Court and, therefore, to be redressed (555 F. 2d at 377), the Third Circuit held in 1978 that it is the combined effect of all of the separate violations that must be cured by the

ing to the Third Circuit, the burden of proof then passed to the defendants to demonstrate that the proffered plan was "arbitrary, fanciful, or unreasonable." The fact is that the proponents of the racial balancing plan admitted unequivocally that the plan in no way attempted to restore the victims of discrimination to the position they would have occupied but for constitutional violations. But this was not deemed to sufficiently meet the defendants' burden of proof, a burden which was again imposed after the fact.

In *Columbus* and *Dayton* and *Wilmington*, it was conceded by the courts below that residential concentration of minorities would have existed to a significant degree in spite of the alleged constitutional violations. Nevertheless, in each case, the courts approved remedial decrees requiring maximum racial diffusion throughout the school districts in question (in Ohio) and in eleven districts in the metropolitan Wilmington area, none of which, except the Wilmington district, was guilty of any constitutional violation. The conditions thus imposed do not even purport to represent what would have existed in the total absence of constitutional transgression. It is apparent that this Court's language in *Dayton* in 1977 as to "incremental segregative effect" has been ignored.

III. Burden of Proof

The allocation of burden of proof is fundamental to the orderly and just functioning of the litigation process. The allocation of the burden of proof represents, on the one hand, a substantive legal determination while, on the

2. (Cont'd.)
remedy (582 F. 2d at 764). The court-imposed requirement for the school authorities to develop a plan to remedy all of these suggested violations, the continuing segregative effects of which had not been determined by the trial court, was an impossible one as observed by the three judge dissent in 555 F. 2d 373 at 383-385.

other hand, it establishes the procedural framework in which litigants must operate. In most litigation, the burdens of proof are well established and clearly understood by the parties. In desegregation litigation, it increasingly appears that there is no clearly established burden of proof and that, rather, courts have manipulated the burden of proof, after the fact, to justify a desired result.

Distortion of the burden of proof can take different forms. In the *Columbus* and *Dayton* cases, the Sixth Circuit made a quantum leap from the finding of discrete constitutional violations to an areawide urban racial balance remedy by finding that a dual system existed in 1954, that systemwide segregation prevailed at the present time and that only a systemwide racial balance remedy would redress that condition. This process, which completely eliminates the need for the "complex factual determinations" referred to by this Court in *Dayton, supra,* involves nothing less than an unfounded presumption of a direct causal connection between remote, historical facts, isolated subsequent occurrences, and a present condition. Such unstructured and unrestrained use of an ill-defined presumption certainly seems to be in contravention of the causation requirements enunciated by this Court in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U. S. 274 (1977).

In *Evans v. Buchanan,* 582 F. 2d 750 (3rd Cir. 1978), the Third Circuit adopted a similar burden shifting process to justify the areawide racial balance result. The Third Circuit invoked the *Keyes* presumption, *Keyes v. School District No. 1, Denver, Colorado,* 413 U. S. 189 (1973), to support the proposition that in a school desegregation case with a prior history of de jure segregation, the burden of proof was upon the defendant to establish that the proffered racial balance plan was "arbitrary, fanciful, or unreasonable", which burden the court found

the defendants had failed to meet. 582 F. 2d at 764-765.[3] Thus, in Wilmington, as in Ohio, the court justified an areawide racial balance plan by holding that defendants had failed to meet the burden of proof, despite the acknowledgement by all concerned that the racial composition of the affected schools would in no way have approximated the composition required by the plan in the absence of any or all of the alleged constitutional violations. The Third Court's use of *Keyes, supra,* to justify this procedure is dubious at best. *Keyes* was, of course, a single district case concerned strictly with the actions and nonactions of school officials. In the proper context, the *Keyes* presumptions are appropriate and, in fact, have been deemed a tautology. Kenner, *From Denver to Dayton, The Development of a Theory of Equal Protection Remedies,* 72 NWU Law Rev. 382, 386 (1977). The *Keyes* presumption loses all logical content in the context of a multi-district case premised largely on housing practices.

Fundamental fairness requires that parties to desegregation litigation have the benefit of clearly established burdens of proof when they try their cases, rather than being confronted with shifting burdens of proof, established after the fact, which justify a given result in a given case.

3. The Third Circuit implied that the trial court held extensive hearings which were designed to give the defendants an opportunity to meet this burden of proof. Since this burden of proof was, however, first imposed by the appellate court and was never alluded to in the trial court, this implication was clearly incorrect.

CONCLUSION

In confronting the problem of racial separation in our society, lower federal courts have inflexibly misapplied this court's decisions that the remedy for a dual school system is a unitary one. Once the dual system has been replaced by a unitary one, further constitutional violations, if any, are to be met by specific remedies measured by the effects of the wrongs. Persistent racial separation in urban metropolitan areas of this nation cannot credibly be presumed to be caused by school boards in the absence of proof thereof. But federal courts, in striving inflexibly to maximize racial balance at the expense of all other considerations, have foreclosed innovative or more flexible approaches to this nationwide urban problem, approaches more likely to conform to this Court's expressed doctrine that a remedy is not punitive but curative, not a license for federal court control of state educational systems but only a judicial tool for restoring that which has been improperly taken.

We urge this Court to reverse the decisions of the Sixth Circuit Court of Appeals and in so doing to establish clear and uniform guidelines for the control of desegregation litigation in Delaware and throughout the nation.

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